

§ 2204.101

EDITORIAL NOTE: Nomenclature changes to part 2204 appear at 62 FR 59569, Nov. 4, 1997.

Subpart A—General Provisions

§ 2204.101 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504, provides for the award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called “adversary adjudications”) before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary’s position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards and the procedures and standards that the Commission uses to make awards.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987]

§ 2204.102 Definitions.

For the purposes of this part,

(a) The term *agent* means any person other than an attorney who represents a party in a proceeding before the Commission pursuant to § 2200.22;

(b) The term *Commission* means the Occupational Safety and Health Review Commission;

(c) The term *EAJA* means the Equal Access to Justice Act, 5 U.S.C. 504.

(d) The term *judge* means an administrative law judge appointed by the Commission under 29 U.S.C. 661(i);

(e) The term *OSH Act* means the Occupational Safety and Health Act of 1970, 29 U.S.C. 651–678;

(f) The term *Secretary* means the Secretary of Labor.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987]

§ 2204.103 When the EAJA applies.

The EAJA applies to adversary adjudications before the Commission pending or commenced on or after August 5, 1985. The EAJA also applies to adversary adjudications commenced on or before October 1, 1984, and finally dis-

29 CFR Ch. XX (7–1–01 Edition)

posed of before August 5, 1985, if an application for an award of fees and expenses, as described in subpart B of these rules, has been filed with the Commission within 30 days after August 5, 1985.

[52 FR 5456, Feb. 23, 1987]

§ 2204.104 Proceedings covered.

The EAJA applies to adversary adjudications before the Commission. These are adjudications under 5 U.S.C. 554 and 29 U.S.C. 659(c) in which the position of the Secretary is represented by an attorney or other representative. The types of proceedings covered are the following proceedings under section 10(c), 29 U.S.C. 659(c), of the OSH Act:

(a) Contests of citations, notifications, penalties, or abatement periods by an employer;

(b) Contests of abatement periods by an affected employee or authorized employee representative; and

(c) Petitions for modification of the abatement periods by an employer.

§ 2204.105 Eligibility of applicants.

(a) To be eligible for an award of attorney or agent fees and other expenses under the EAJA, the applicant must be a party to the adversary adjudication. The term “party” is defined in 5 U.S.C. 551(3). The applicant must show that it satisfies the conditions of eligibility set out in this subpart and subpart B.

(b) The types of eligible applicants are as follows:

(1) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interest, and employs not more than 500 employees;

(2) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(3) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(4) Any other partnership, corporation, association, unit of local government, or public or private organization that has a net worth of not more than \$7 million and employs not more than 500 employees; and

(5) An individual with a net worth of not more than \$2 million.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the notice of contest was filed, or, in the case of a petition for modification of abatement period, the date the petition was received by the Commission under § 2200.34(d).

(d) An applicant who owns an unincorporated business shall be considered as an "individual" rather than a "sole owner of an unincorporated business" only if the issues on which the applicant prevails are related primarily to personal interests rather than business interests.

(e) For the purpose of determining eligibility under the EAJA, the employees of an applicant include all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987; 62 FR 59569, Nov. 4, 1997]

§ 2204.106 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings, unless the position of the Secretary was substantially justified.

The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary's position was substantially justified is on the Secretary.

(b) An award shall be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding. An award shall be denied if special circumstances make an award unjust.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987]

§ 2204.107 Allowable fees and expenses.

(a) Awards shall be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) An award for the fee of an attorney or agent under these rules shall not exceed \$125 per hour, unless the Commission determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for Commission proceedings, justifies a higher fee. An award to compensate an expert witness shall not exceed the highest rate at which the Secretary pays expert witnesses. However, an award may include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Commission shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services;